Supreme Court, U.S.
FILED

No. 02 1654 MAY 8 - 2003

In the

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Supreme Court of the United States

VETERINARY SURGICAL CONSULTANTS, P.C.,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Joseph H. O'Donnell, Jr.
Counsel of Record

116 East Allen Street
Philadelphia, PA 19125
(215) 426-3245

Attorney for Petitioner

27 pp

QUESTIONS PRESENTED

1. Does the label "officer" of a corporation, adopted by an individual who is the sole shareholder and only "officer" in an S corporation, require such individual to be treated as an employee of the S corporation, subject to Federal employment taxes, based on a narrow, exclusive, and out of context reading of 26 U.S.C. Sec. 3121(d)(1)?

2. Is an S corporation considered to have a reasonable basis for not treating its sole shareholder and only officer as an employee, pursuant to the provisions of Section 530 of the Revenue Act of 1978 which defines "employment status" existing under the common law rules of the employer-employee relationship?

3. Is due process of the taxpayer violated when the Internal Revenue Service fails at any time to provide the taxpayer with the required written notice of the provisions of Section 530 of the Revenue Act of 1978 with reference to an audit inquiry relating to the employment status of one or more individuals who perform services for the taxpayer, as provided by Section 530(e) of the Act?

CORPORATE DISCLOSURE STATEMENT

The Petitioner: VETERINARY SURGICAL CONSULTANTS, P.C., a professional corporation

VETERINARY SURGICAL CONSULTANTS, P.C., the Petitioner which is a nongovernmental corporate party to the proceedings and was a party to the proceedings as the "Petitioner" in the United States Tax Court and the "Appellant" in the United States Court of Appeals for the Third Circuit.

VETERINARY SURGICAL CONSULTANTS, P.C. does not now have nor has ever had any parent or subsidiary corporations, and it is not now nor ever has been the parent corporation of another corporation nor has it ever been a subsidiary corporation of another corporation.

No publicly held corporation nor any other corporation owns or ever has owned 10 percent or more of the stock of VETERINARY SURGICAL CONSULTANTS, P.C..

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT PROVISIONS INVOLVED IN THE CASE	3
STATEMENT OF THE CASE	3
REASONS RELIED ON FOR ALLOWANCE OF WRIT	5
CONCLUSION	20
APPENDIX:	
CIRCUIT COURT OPINION	1a
JUDGMENT OF CIRCUIT COURT	10a
U.S. TAX COURT OPINION	12a
U.S. TAX COURT DECISION	27a
CIRCUIT COURT ORDER DENYING REHEARING EN BANC	29a
PERTINENT PORTIONS OF THE TEXT OF FEDERALLY ENACTED STATUTES RELEVANT TO THIS CASE:	
I. PERINENT PARTS OF FEDERALLY ENACTED STATUTES:	
A. 26 U.S.C. Sec. 1366	31a
B. 26 U.S.C. Sec. 3121(d)	32a
C. Section 530 of the Revenue Act of 1978	33a
II. Revenue Procedure 85-18 I.R.B. 1985-13, 27	35a

TABLE OF AUTHORITIES

Page

CASES

DAVID A. GITLITZ, ET UX, ET AL v. COMMISSIONER OF INTERNAL REVENUE, 121 S.Ct. 701 (2001) 16

DEECY PRODUCTS CO. v. WELCH, 124 F.2d 592 (1st Cir. 1941) 8

DEVINE v. STONE, LEYTON & GERSHMAN, P.C., !)) F.3d 78, 80-81 (8th Cir. 1996) 10

DURANDO v. UNITED STATES, 70 F.3d 548, 552 (9th Cir. 1995) 6

EEOC v. DOWD & DOWD, LTD., 736 F.2d 1177 (7th Cir. 1984) 10

F. DREW CAMINETTI v. UNITED STATES, 242 U.S. 470, 37 S.Ct. 192 (1917) 15

FOUNTAIN v. METCALF, ZIMA & CO., P.A. 925 F.2d 1398, 1400-01 (11th Cir. 1991) 10

IDAHO AMBUCARE CENTER, INC. v. U.S., 57 F.3d 752, 756 (9th Cir. 1990 7

JOSEPH RADTKE, S.C. v. UNITED STATES, 895 F.2d 1196 (7th Cir. 1990) 9

NATIONWIDE MUTUAL INS. CO. v. DARDEN, 503 U.S. 318, 323-24, 112 S.Ct. 1344, 117 L.Ed. 581 (1992) 9

ROSENBERG v. XM VENTURES, 274 F.3d 137, 141 (3d Cir. 2001) 6

ROWLAND v. CALIFORNIA MEN'S COLONY, UNIT II MEN'S ADVISORY COUNSEL, 506 U.S. 194, 113 S.Ct. 716 (1993) 12

SIMBRAW v. UNITED STATES, 367 F.2d 373 (3d Cir. 1966) 12

TABLE OF AUTHORITIES
(Continued)

Page

CASES (Continued)

SPICER ACCOUNTING, INC. v. UNITED STATES, 918 F.2d 90 (9th Cir. 1990) 6

STROTHER v. SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, 79 F.3d 859, 865-68 (9th Cir. 1996) 10

TEXAS CARBONATE CO. v. R.L. PHINNEY, 307 F.2d 289 (5th Cir. 1962) 9

UNITED STATES v. ABERDEEN AERIE NO. 24 OF FRATERNAL ORDER OF EAGLES, 148 F.2d 655 (9th Cir. 1945) 7

UNITED STATES v. GRISWOLD, 124 F.2d 599, 602 (1st Cir. 1941) 8

WELLS v. CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C., 271 F.3d 903 (9th Cir. 2001), **cert. granted**, No. 01-1435, 123 S.Ct. 31, 153 L.Ed. 2d 893 (Oct. 1, 2002) 9

ZIMMERMAN v. N. AMERICAN SIGNAL CO., 704 F.2d 347, 351 (7th Cir. 1983) 9 & 10

STATUTES

1 U.S.C. Sec. 1 11

26 U.S.C. Sec. 108(d)(7)(A) 18

26 U.S.C. Sec. 1366 (See Appendix pages 31a & 32a) 3

26 U.S.C. Sec. 3121(a) 11

26 U.S.C. Sec. 3121(b) 11

26 U.S.C. Sec. 3121(c) 12

TABLE OF AUTHORITIES
(Continued)

Page

STATUTES (Continued)

26 U.S.C. Sec. 3121(d) 13
(See Page 32a of Appendix)

26 U.S.C. Sec. 3121(d)(1) 3

26 U.S.C. Sec. 3121(d)(2) 15

26 U.S.C. Sec. 3306(i) 13

26 U.S.C. Sec. 3401(C) 13

26 U.S.C. Sec. 7436(a) 5

28 U.S.C. Sec. 1254(1) 2

Section 530 of the Revenue Act of 1978, 11
P.L. 95-600 as amended by P.L. 96-267,
P.L. 96-541, P.L. 97-248, P.L. 99-514,
and P.L. 104-188 (See Appendix: Pages 35a & 36a)

Sect. 530(a) of the Rev. Act of 1978 13
(See Appendix: pages 33a & 34a)

Sect. 530(c)(2) of the Rev. Act of 1978 13
(See Appendix: Page 34a)

Sect. 530(e) of the Rev. Act of 1978 19

OTHER NON-LEGISLATIVE AUTHORITIES

Revenue Procedure 85-18, I.R.B. 1985-13, 13
1985-13, 27 (See Appendix: Page 35a)

Revenue Ruling 1959-1, C.B. 225 18

Treasury Regulation 31.3121(d)-1(b) 13
(See Appendix: Page 5a)
(also known as: 26 C.F.R. 31.3121(d)-1(b))

IN THE
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VETERINARY SURGICAL CONSULTANTS, P.C.,

Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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VETERINARY SURGICAL CONSULTANTS, P.C., Petitioner, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

This case involves Petitioner's challenge of a "Notice of Determination Concerning Worker Classification Under Section 7436" served by Respondent upon Petitioner on November 17, 1998.

Petitioner timely filed its petition in the United States Tax Court which assigned petitioner docket number 2500-99. Petitioner subsequently filed its appeal from the tax Court decision entered October 16, 2001, based on the Tax Court's opinion, No. 117 T.C. No. 14, dated October 15, 2001, to the United States Court of Appeals for the Third Circuit and was assigned No. 02-1214. The Third Circuit issued its opinion in petitioner's appeal on December 18, 2002; wherein the Third Circuit combined petitioner's case with another appellant, Yeagle Drywall Company, Inc., No. 02-1132, which also sought an

appeal from the Tax Court concerning similar issues; i.e., the reclassification of distributions from the profits of an S corporation to its shareholder as wages to the shareholder-officer.

Petitioner and Yeagle Drywall Company, Inc. (YDC) then filed a joint motion for rehearing en banc with the Third Circuit; said motion for rehearing en banc was subsequently denied by the Third Circuit on March 5, 2003. All opinions, decisions, judgments, and orders in the lower courts in this case have been reproduced in the Appendix which is being simultaneously filed with this petition.

A petition for a writ of certiorari to this Court for YDC is also being filed with this Court. The governing legislation in both this case and that of YDC involves the Internal Revenue Code (26 U.S.C.) and relevant parts of Section 530 of the Revenue Act of 1978 (App.: pp. 33a & 34a).

A CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The date the judgment of the United States Court of Appeal for the Third Circuit sought to be reviewed was entered December 18, 2002 (App.: p. 11a).

The date of the order by the United States Court of Appeals for the Third Circuit denying petitioner's motion for rehearing en banc was March 5, 2003 (App.: pp. 29a & 30a) and the "formal mandate" of the Third Circuit in this case was dated March 13, 2003 (App.: p.11a).

Jurisdiction is conferred on this Court under 28 U.S.C. Sec. 1254(1).

RELEVANT PROVISIONS INVOLVED IN THE CASE

I. Statutes:

A. 26 U.S.C. 1366 (App.: pp. 31a & 32a)
B. 26 U,S.C. 3121(d)(1) (App.: p. 32a)
C. Section 530 of the Revenue Act of 1978 (App.: pp. 33a & 34a)

II. Non-legislative Internal Revenue Service Revenue Procedure and Treasury Regulation:

A. Revenue Procedure 85-18 (App.: p. 35a)
B. Treasury Regulation 31.3121(d)-1(b) (also known as "26 C.F.R. Sec. 31.3121(d)-1(b))(App.: p. 5a)

STATEMENT OF THE CASE

Petitioner is a professional corporation engaging in the business of veterinary medical consulting and surgical procedural services which was incorporated under the professional corporation law of Pennsylvania on May 22, 1991. Since its incorporation and all during 1994, 1995 and 1996, Kenneth K. Sadanaga, D.V.M. ("Dr. Sadanaga") was petitioner's sole shareholder and president, and he was the only person in petitioner who derived petitioner's income.

Shortly after incorporating in 1991, petitioner applied and was approved for subchapter S corporation status by the Internal Revenue Service ("I.R.S."), subjecting petitioner to the pass-through rules of 26 U.S.C. Sec. 1366 beginning with the 1991 calendar year and each year thereafter. That being the case, petitioner and Dr. Sadanga actually filed each of their yearly tax returns, beginning with 1991 and each year thereafter, in a manner consistent with S corporation pass-through rules to its shareholder in conformity with the provisions of Sec. 1366; i.e., the character of the gross receipts of petitioner (non-employee compensation) for each year retained the same character of petitioner's

net income distributed to Dr. Sadanga for each year; wherein petitioner's net income was always reported as gross income on the personal federal tax return (Form 1040) of Dr. Sadanga as required by Sec. 1366. Petitioner never treated Dr. Sadanga as an employee, and all petitioner's federal tax returns (Forms 1120S and Schedules K-1 attached thereto) in a manner not treating Dr. Sadanga as an employee of petitioner, since no employment status ever existed between petitioner and Dr. Sadanga.

The character of petitioner's income in 1994, 1995 and 1996 was the result of Pennsylvania licensed professional veterinary consulting and surgical work done solely by Dr. Sadanga which was never characterized as "wages" paid by Veterinary Orthopedic Services, Ltd. ("VOS") to petitioner. Instead, all payments from VOS to petitioner in each of the years at issue were reported on Form 1099-MISC as the record clearly shows. The said Form 1099-MISC payments for 1994, 1995 and 1996 paid by VOS to petitioner were, therefore, reported as the gross receipts on each year of petitioner's federal tax return Form 1120S, and, after deducting petitioner's expenses in each year at issue, petitioner reported its net income in the respective year as "ordinary income" on petitioner's Form 1120S: Schedule K-1 which was then reported as gross income ("non-passive income" from an S corporation) on Dr. Sadanga's personal federal tax return Form 1040 for each respective year. These facts are in the record of the lower courts and were never in dispute.

After being notified by I.R.S. of an audit inquiry of petitioner's 1995 tax return Form 1120S, petitioner's accountant and duly authorized representative met with I.R.S. agent Tepper, and as a result of that meeting, Agent Tepper determined a "no change" status to petitioner's 1995 Form 1120S. During the said meeting between Agent Tepper and petitioner's

accountant, I.R.S. Agent Surla entered the meeting and insisted that Dr. Sadanga was an employee of petitioner which was denied by petitioner's accountant at that meeting. Neither Agents Tepper nor Surla provided petitioner's authorized representative, petitioner, or Dr. Sadanga any written notice of the provisions of Section 530 of the Revenue Act of 1978 (a requirement of Sect. 530(e) of the Act) either prior to, at the commencement of, or at any time after the audit inquiry into the employment status of Dr. Sadanga. Neither Dr. Sadanga nor petitioner's accountant was aware of the provisions of Section 530 of the Revenue Act of 1978 ("Sect. 530") until after the Tax Court delivered its decision in this case.

After receiving the Notice of Determination letter from I.R.S., petitioner then timely filed its petition in the United States Tax Court which was the court of first instance and which had jurisdiction under 26 U.S.C. Sec. 7436(a) which was the federal jurisdictional basis to hear this case in the Tax Court.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. THERE ARE SEVERAL CONFLICTING OPINIONS IN DIFFERENT UNITED STATES CIRCUIT COURTS OF APPEAL WITH RESPECT TO THE METHOD USED IN DETERMINING WHETHER AN OFFICER OF A CORPORATION IS OR IS NOT AN EMPLOYEE OF THE CORPORATION.

Some Circuit Courts ignore the usual common law rules of the employer-employee relationship in interpreting the meaning of 26 U.S.C. Sec. 3121(d)(1); other circuit courts reject the argument that an officer of a corporation must meet the employer-employee relationship test to be properly classified as an employee subject to employment taxes' withholding; while other

circuit courts have ruled that the employer-employee relationship tests must be applied and analyzed in each situation with respect to the question as to whether a corporate officer is or is not an employee of the corporation. At first glance, a narrow and exclusive reading of Sec. 3121(d)(1) makes an employee out of every corporate officer, simply because an individual chooses to label himself or herself as such.

Even the Third Circuit, from which this appeal is taken, admitted in its own opinion in this case, that "by rejecting the taxpayers' [petitioner and Yeagle Drywall Company, Inc.] argument, we are avoiding an interpretation of Sec. 3121(d) which would render subparagraph (1) [Sec. 3121(d)(1)] superfluous. See **Rosenberg v. XM Ventures**, 274 F.3d 137, 141 (3d Cir. 2001)." (See App.: p. 7a). The Third Circuit also relied on **Spicer Accounting, Inc. v. United States**, 918 F.2d 90 (9th Cir. 1990) which disregarded any application of the usual common law rules of the employer-employee relationship tests in determining that Mr. Spicer was the employee of Spicer Accounting, Inc., even though there was no other living person in Spicer Accounting to qualify as Mr. Spicer's "employer."

The Ninth Circuit in 1995 defined how and why an S corporation's income passes through to its shareholder in **Durando v. United States**, 70 F.3d 548, 552 (9th Cir. 1995), even though **Durando** was not a case concerning the employment status of an S corporation shareholder, which ruled that "[a]n S corporation's income passes through to its shareholders not because they helped to create that income, but because they are shareholders. See I.R.C. Sect. 1366(a)." **Durando** went on to state that Mr. Durando performed ". . .a substantial amount of time providing business services to at least one of the S corporations..." (70 F.3d 548 at 549).

The Ninth Circuit also gave an opinion concerning its decision in **Spicer**, in **Idaho Ambucare Center, Inc. v. U.S.**, 57 F.3d 752, 756 (9th Cir. 1990) that a person can be an officer of a corporation and have a dual capacity as an independent contractor of the same corporation which stated, inter alia:

> "We are not convinced that **Spicer** forecloses the application of a dual capacity analysis. Having concluded that Mr. Spicer performed substantial services, the **Spicer** Court went on to analyze Mr. Spicer's status under the common law rules, implicitly suggesting that if Mr. Spicer were an independent contractor under such rules, he would not be considered a corporate employee, despite his role as a corporate officer performing substantial services. Such approach is entirely consistent with the dual capacity analysis which Ambucare seeks to have us apply.
>
> We also note that the IRS, in a series of revenue rulings, has previously adopted the analysis which it today asks us to reject..."

Almost 60 years ago, the Ninth Circuit rejected the "per se" corporate officer issue in **United States v. Aberdeen Aerie. No. 24 of Fraternal Order of Eagles**, 148 F.2d 655 (9th Cir. 1945), in which the question presented was whether the "president, vice preseident, treasurer and trustee were 'employees' within the meaning of Title VII of the Social Security Act." The Court rejected the argument that an officer is "per se" an employee and applied the common law test to find that physicians of the fraternal lodge were officers but were independent contractors as well, since no one could **control** their medical work. This was apparently the first

case in the Ninth Circuit to recognize dual status. The Court also distinguished manual labor from professional work stating, "[T]hey are distinguishable on their facts as manual labor is from professional work." and:

> ". . .There is considerable discussion by both appellant and appellees with respect to whether Section 1101(a) of Title XI of the Social Security Act, 42 U.S.C.A. 1301(a)(6), applicable to both Titles VIII and IX of that Act, and Sections 1426(d) and 1607(i) of the Internal Revenue Code should be construed to mean that an officer of a corporation is an employee per se. While that question is not properly before this Court, for the District Court made no such finding, we are inclined to agree with the considered weight of authority that each officer must meet the accepted tests of employer-employee relationship to come within the scope of the Act." (148 F.2d 655 at 658)

In 1941 the First Circuit rejected the "per se" or "ipso facto" argument of a corporate officer's employment status with the corporation in **United States v. Griswold**, 124 F.2d 599, 602 (1st Cir. 1941) which followed its prior case in **Deecy Products Co. v. Welch**, 124 F.2d 592 (1st Cir. 1941). The legislative history proves that the "officer" language was inserted into 26 U.S.C. Sec. 3121(d)(1) to make clear that supervisory persons could obtain social security. **Deecy**, 124 F.2d at 596, noted that the hearings before the Senate Committee on Finance in S.1130, 74 Cong. 1st Sess. 719 (1934) on the Economic Security Act which became the Social Security Act of 1935, discussed exceptions of "white collar" workers from the Act.

In the present case, petitioner relied on the

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analysis of the Fifth Circuit in determining whether an officer of a corporation was "per se" an employee by stating that the usual common law tests had to be applied the officer of Texas Carbonate Co. was an employee of the corporation not merely because he worked but because he was under the control of others (a board of directors) in the corporation, and that the usual common law rules of the employer-employee relationship had to be applied. (**Texas Carbonate Co. v. R.L. Phinney**, 307 F.2d 289 (5th Cir. 1962)). The Third Circuit rejected the Fifth Circuit's approach in **Phinney** and relied solely on the **Spicer** and the Seventh Circuit's analysis in **Joseph Radtke, S.C. v. United States**, 895 F.2d 1196 (7th Cir. 1990).

The issue of labels or titles of reclassified workers versus economic reality as to whether an officer is an employee of the corporation was addressed in another Ninth Circuit Court appeal presently before this Honorable Supreme Court on granted certiorari in **Wells v. Clackamas Gastroenterology Associates, P.C.**, 271 F.3d 903 (9th Cir. 2001), **cert. granted**, No. 01-1435, 123 S.Ct. 31, 153 L.Ed. 2d 893 (Oct. 1, 2002). **Wells** has to do with the determination of the employment status of corporate officers holding professional medical licenses, and it deals with Antidiscrimination Act matters; although it is not a tax case, it construes the definition of employee and will set precedent in tax cases in the same manner as **Nationwide Mutual Ins. Co. v. Darden**, 503 U.S. 318, 323-24, 112 S.Ct. 1344, 117 L.Ed. 581 (1992). As in **Wells**, the Ninth Circuit rejected the "economic realities test" to determine that stockholders were employees. The dissent in **Wells** argued that under the "economic realities test," the shareholders were not partners, citing, among other cases, **Zimmerman v. N. American Signal Co.**, 704 F.2d 347, 351

(7th Cir. 1983), a case holding that unpaid officers are not employees. **Zimmerman** held that the terms used to describe the relationship are not dispositive of the nature of the relationship.

Petitioner is a professional corporation much like that of Clackamas Gastroenterology Associates, P.C. in the **Wells** case, and as such a professional corporation is only permitted to have professionals, licensed by the State where the corporation was incorporated, who are its shareholders and officers. There is a fundamental difference between an owner of a business and an individual who is working as an employee in the same business for wages. Dr. Sadanga is and was all during petitioner's existence a professionally licensed veterinarian in the State of Pennsylvania who decided to incorporate his business as its owner in reality and not as a hired employee under any contract of employment. In the **Wells** case, the officers/physicians had an employment contract with the corporation, and even though such a contract existed, the trial court found that those officers were not employees because they were not controlled by anyone in the corporation, but **Wells** was reversed on appeal to the Ninth Circuit.

The Ninth Circuit **Wells** dissent by Judge Graber argued that the governing factor in determining who is or who is not an employee is not determined by "labels" but rather by "realities." (See **EEOC v. Dowd & Dowd, Ltd.**, 736 F.2d 1177 (7th Cir. 1984); **Devine v, Stone, Leyton & Gershman, P.C.**, 100 F.3d 78, 80-81 (8th Cir. 1996); **Fountain v. Metcalf, Zima & Co., P.A.**, 925 F.2d 1398, 1400-01 (11th Cir. 1991).) The **Wells** dissent went on to cite **Strother v. Southern California Permanente Medical Group**, 79 F.3d 859, 865-68 (9th Cir. 1996) which "suuggests

that economic realities are more important than labels." (271 F.3d at 906).

II. THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH WAS WRONGLY DECIDED BY THE THIRD CIRCUIT AND WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

Respondent, the Tax Court, and the Third Circuit have interpreted 26 U.S.C. Sec. 3121(d)(1) narrowly, exclusively, and out of context. In addition, the relief provisions from employment status as contained in the safe harbor legislation of Section 530 of the Revenue Act of 1978, P.L. 95-600 as amended by P.L. 96-167, P.L. 96-541, P.L. 97-248, P.L. 99-514, and P.L. 104-188 ("Sect. 530"), which is also known as "The Small Business Protection Act," have been misapplied with regard to whether or not an officer of a corporation is an employee of the corporation. When interpreting the meaning of a statute, it is the obligation of the courts to read a statute in light of its context based on 1 U.S.C. Sec. 1 which states: "In determining the meaning of any act of congress, unless the context indicates otherwise—. . ." and also by applying the generally accepted definitions of the words and phrases used in any statute. These doctrines apply to understanding the meaning of 26 U.S. Sec. 3121(d)(1) and Sect. 530.

The Tax Court and the Third Circuit ignored the definition of "employee" as a person in the employ of another "person" who is separate and distinct from the employee. Such other "person" is used as the term identifying an employer throughout the employment tax statutes as well as in Sect. 530. The term "employment" in 26 U.S. Sec. 3121(b) "means any service, of whatever nature, performed (A) by an employee for the person employing him. . ." Therefore, an employer must be a different "person" than the "employee." Again, in 26 U.S.C. Sec. 3121(a), ". . .the term

"wages" means all remuneration for employment. . ." Therefore, where there is no employment between two separate and distinct persons, there are no wages due to any individual without another person who could or actually does employ him. Even in 26 U.S.C. Sec. 3121(c), the "person employing him" is continually mentioned with respect to the employer for purposes of "included and excluded services." Dr. Sadanga never had a "person employing him" and, therefore, never had an employer.

Since petitioner is and was during all of 1994, 1995, and 1996 a corporation with no other "person" in it who could hire, fire, or supervise Dr. Sadanga in any way, then the economic reality test, if applied to this case, clearly demonstrates no employment status ever between Dr. Sadanaga and petitioner. The Third Circuit in **Simbraw v. United States**, 367 F.2d 373 (3d Cir. 1966) emphasized the fact that a corporation can not act nor give any authority to its officer, since it is not a "person." Therefore, since a corporation can not act, being an "artificial entity" as declared by this Court in **Rowland v. California Men's Colony, Unit II Men's Advisory Counsel**, 506 U.S. 194, 113 S.Ct. 716 (1993), can not give authority to anyone, nor control its only officer and sole shareholder in any way, then it can not be an employer of its only shareholder-officer, and the economic reality of the situation is that no employer-employee relationship can possibly exist between the artificial entity corporation and its sole shareholder-officer, as is the case with petitioner and Dr. Sadanaga as well as in the companion case with Yeagle Drywall Company, Inc. and John Yeagle, a 99 percent shareholder of the corporation (Third Circuit Appellant No. 02-1132) which is also being appealed to this Court.

The Third Circuit also failed to recognize and apply the plain language definition of "employment status" as contained in Sect. 530(c)(2) of the Revenue Act of 1978 (See App.: p. 34a) which clearly and unambiguously mentioned the "usual common law rules applicable in determining the employer-employee relationship." Nothing in 26 U.S.C. Sec. 3121(d)(1) suspends the definition of "employment status" as contained in Sect. 530(c)(2), and such definition is appropriately applied to the term "employee" in determining whether or not an officer of a corporation falls under the term "employee." Sect. 530(c)(2) is, therefore, part and parcel of the context of 26 U.S.C. Sec. 3121(d)(1). Sec. 3121(d)(1) is not excluded anywhere in Sect. 530, and the relief provisions of reasonable basis for not treating an individual as an employee applies to officers of corporations as well as all other workers.

Even the I.R.S. does not exclude officers as being potentially protected from classification as employees under Revenue Procedure 85-18, I.R.B. 1985-13, 27 (App.: p. 35a); i.e., "for purposes of section 530(a) of the Act, the term employee means employees under sections 3121(d), 3306(i) and 3401(C) of the Code." (Rev. Proc. 85-18). It should also be noted that the I.R.S. considers a "reasonable basis" for not treating an individual as an employee to not just be limited to the method enumerated in Sect. 530(a) of the Rev. Act of 1978, and the I.R.S. published Rev. Proc. 85-18 also states, "that "reasonable basis" should be construed liberally in favor of the taxpayer. . ."

The Third Circuit also went outside the statutory language of the context of Sec. 3121(d)(1) by relying on a non-legislative pronouncement by I.R.S. in its Treasury Regulation 31.3121(d)-1(b) as found in 26 C.F.R. Sec. 31.3121(d)-1(b) which focuses on

whether an officer of a corporation performs services on behalf of the corporation. The non-legislative Treasury Regulation posits that an officer of a corporation is not an employee of the corporation if that officer does not perform any services or performs only minor services (App.: p. 5a) without any mention or regard for the necessary employer-employee relationship tests under the usual common law rules as defined in Sect. 530(c)(2), since the said Treasury Regulation, not an Act of Congress, was published prior to the enactment of Sect. 530. Therefore, Treasury Regulation 31.3121(d)-1(b) should not have been relied on to determine whether Dr. Sadanaga was or was not an employee of petitioner.

In sum, the employer-employee relationship test ("master-servant relationship") and the economic realities test should be applied to determine any employment status between petitioner and Dr. Sadanaga.

Petitioner also asks this Court to consider the due process violation committed by Respondent, since the I.R.S. agents conducting the employment tax audit inquiry of petitioner never provided petitioner with the Sect. 530(e) (App.: p. 34a) written notice of the provisions of Sect. 530, and the petitioner believes this was an intentional omission on the part of I.R.S..

III. THIS CASE HAS BEEN DECIDED BY THE THIRD CIRCUIT IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The Third Circuit went to sources outside of the Congressionally enacted statutes to justify a wrong definition of the term "employee," as found in 26 U.S.C. Sec. 3121(d) and the phrase "any officer of a corporation; or" in Sec. 3121(d)(1). The Third Circuit incorrectly eliminated the necessity of applying the usual common law tests

of the employer-employee relationship because the word "or" appears in Sec. 3121(d)(1), thereby making the contextual setting of the following phrase in Sec. 3121(d)(2) of no consequence and of no effect in respect to "any officer of a corporation" The Third Circuit's "NOT PRECEDENTIAL" opinion never recognized the weight of the context in which Sec. 3121(d)(1) appears which includes the lack of "person" status of the petitioner, the plain definitions of the terms "employer," "employee," and "employment status" as found throughout the employment tax statutes as well as in Sect. 530 of the Rev. Act of 1978.

This Court ruled in **F.Drew Caminetti v. United States**, 242 U.S. 470, 37 S.Ct. 192 (1917), that "[s]tatutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributable to them..." (37 S.Ct. at 194). The **Caminetti** Court went on to state:

> "[S]till, the name given to an act by way of designation or description, or the report which accompanies it, cannot change the plain import of its words. If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning. . .when the words are free from doubt, they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by consideration drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impractical consequences, it is the sole evidence

of the ultimate legislative intent." (37 S.Ct. at 196)

By relying on an "extraneous source" in the form of the Treasury Regulation 31.3121(d)-1(b) in order to find a different meaning of the plain statutory language defined clearly in Sect. 530(c)(2) and the context of Sec. 3121(d)(1) in conjunction with other parts of Sec. 3121 and all the employment tax statutes regarding the terms "employer," "employee," and "employment status," the Respondent, the Tax Court, and now the Third Circuit have concocted an "employer" and an "employee" out of thin air, since petitioner was never an employer of anyone, and Dr. Sadanaga certainly was never petitioner's employee by applying the required and necessary common law tests of the employer-employee relationship as well as the "economic realities" tests as mentioned throughout this petition and by numerous authorities.

The case of **David A. Gitlitz, et ux, et al v. Commissioner of Internal Revenue**, 121 S.Ct. 701 (2001) dealt with a narrow, exclusive and out of context reading of 26 U.S.C. Sec. 108(d)(7)(A) with reference to how cancellation of debt should be treated by an S corporation and that S corporation's shareholder, and that the Sec. 1366 pass-thru rules of an S corporation to its shareholder are not suspended by Sec. 108(d)(7)(A). The **Gitlitz** Court stated, inter alia:

> "The very purpose of a Subchapter S is to tax at the shareholder level. Income is determined at the S corporation level, see Sect. 1366(b); not in order to tax the corporation, see Sect. 1366(a)(exempting an S corporation from income tax), but solely to pass through to the S corporation shareholders the corporation's income. Thus, the controlling provision

> states that, in determining a shareholder's liability, 'there shall be taken into account the shareholder's pro rata share of the corporation's...items of income...' Sect. 1366(a). Nothing in Sect. 108(d)(7)(A) suspends the operation of these ordinary pass-through rules...The Commissioner finds support for his literal exclusive reading of Sect. 108(d)(7)(A)'s language in the fact that his reading would close a significant tax loophole. That loophole — preserved by the majority — would grant a solvent shareholder a tax benefit in the form of permission to take an otherwise unavailable deduction...Moreover, the benefit often would increase in value as the amount of COD income increases, a result inconsistent with congressional intent...to impose a 'price' on excluded COD."

The pass-through rules include instructions as to the character of income passed through by the S corporation to its shareholder. Sec. 1366(b) clearly and plainly states that the "character of any item included in a shareholder's pro rata share...shall be determined as if such item were realized directly from the source from which realized by the corporation..." (App.: pp. 31a & 32a). Simply stated the net income of an S corporation from its business activities in the case of petitioner, specifically, was never characterized as wages, and, therefore, can not be characterized as "wages" passed through to Dr. Sadanaga, pursuant to the rules in Sect. 1366(a) concerning the "character" or nature of the income passed through from petitioner to its sole shareholder, Dr. Sadanaga. Nothing in Sec. 3121(d)(1) suspends or changes those "character" pass through rules of Sec. 1366(b); just as nothing in Sec. 108(d)(7)(A) suspends or changes those same

Sec. 1366 pass through rules of an S corporation to its shareholder in **Gitlitz.**

In the instant case, the I.R.S. perceived that the treatment of Dr. Sadanaga as not being an employee would be a tax loophole needing to be closed by declaring petitioner's sole shareholder-officer as an employee, so that FICA and FUTA employment taxes would be required, since no such self employment social security tax is due or ever was due from petitioner or Dr. Sadanaga in S corporation status, pursuant to a 1959 I.R.S. Revenue Ruling 1959-1 C.B. 225 which states in pertinent part that distributions from an S corporation to its shareholder are not to be considered as self employment income which would otherwise be subject to the same rate of tax as that of an employer and employee relationship. By publishing Rev. Rul. 1959-1 C.B. 225, the I.R.S. appeared to be addressing the question as to whether or not an S corporation shareholder was in reality self employed and, therefore, subject to the self employment social security tax which was much lower in 1959 than during the years at issue in this case.

This Court's ruling in **Rowland** also helps petitioner's position, since a corporation was deemed to be an "artificial entity" and not a person which could give authority to its officer to represent it in a court of law. It is a required prerequisite that an "employer" be a living person, and if only one person exists in a corporation, as is the case here, that corporation, including petitioner, can not be an employer, even though the sole person in the corporation chooses to label himself an "officer." This is true in light of the definition of employer as the "person employing" him or her. It seems unjust to rule that a corporation is an employer and a "person" merely because an officer exists in that corporation. However, this is

exactly what Respondent, the Tax Court and the Third Circuit have done in order to get money out of petitioner in the form of employment taxes when none were ever due.

Most importantly, this Court should resolve the conflict between the various Circuit Courts of Appeal and even conflicting opinions within the same Circuits regarding officers of corporations and their status as not being employees of the corporations or of being employees of the corporations.

The petitioner asserts that it was mislead by the I.R.S. in two ways: (1) The I.R.S. did not challenge or attempt to reclassify Dr. Sadanaga as an employee for any period during 1991, 1992, and 1993, the first three years of petitioner's existence as an S corporation which passed through its net income to Dr. Sadanaga in the same manner as the manner used during 1994, 1995, and 1996, the years at issue in this case. Why didn't the I.R.S. declare petitioner an employer of its sole shareholder for the very first year of petitioner's existence instead of waiting several years later until 1998? The only apparent reason might be that the I.R.S. intentionally mislead petitioner into believing it was properly passing through its income to Dr. Sadanaga during 1991, 1992, and 1993, so that a larger assessment could be made against petitioner by waiting to make the determination that an employment status existed between petitioner and Dr. Sadanaga; (2) petitioner asserts that the I.R.S. intentionally did not comply with the requirement of Sect. 530(e) to provide petitioner with the written notice of the provisions of Sect. 530 of the Rev. Act of 1978, so that petitioner would not have the benefit of any "safe havens" or relief granted to it by the attack of the I.R.S. on petitioner.

CONCLUSION

THEREFORE, Petitioner, VETERINARY SURGICAL CONSULTANTS, P.C., requests of this Court that it GRANT its Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPECTFULLY SUBMITTED,

Joseph H. O'Donnell, Jr.
Counsel of Record

116 East Allen Street
Philadelphia, PA 19125
(215) 426-3245

Attorney for Petitioner